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No. 448

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

R. E. HOOD,
Petitioner,

vs.

RUBY GA[redacted] HOOD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I. OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is found on page 3 of the supplemental transcript of the record and is printed in the appendix, *infra*, p. A1.

No opinion was delivered by the District Court.

II. JURISDICTION AND GROUNDS FOR ALLOWANCE OF THE WRIT

The judgment of the Court of Appeals is dated and was entered August 6, 1964. (S.R. 4[1])

Jurisdiction to review the judgment is conferred upon this Court by Section 1254 of the Judicial Code, 28 U.S.C., Section 1254(1).

The grounds relied upon for allowance of the writ are:

1. The Court of Appeals refused to accord full faith and credit to the judgment of the District Court of Seward County, Kansas, contrary to 28 U.S.C., Section 1738 and *Millikin* v. *Meyer*, 311 U.S. 457.

2. The Court of Appeals sanctioned disobedience by respondent of a mandatory injunction by the District Court of Seward County, Kansas, and affirmed a judgment granting her relief from which she had been barred and foreclosed by the decree of the District Court of Seward County, Kansas.

3. In permitting a collateral attack upon the decree of the District Court of Seward County, Kansas, the Court of Appeals acted contrary to the governing decisions of the Supreme Court of Kansas.

4. The decision results in a conflict between the Federal Court judgment and the State Court judgment.

III. QUESTION PRESENTED FOR REVIEW

Where a stipulation for division of property, induced by fraud, has been incorporated into a divorce decree of a

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1. Supplemental transcript of the record.

State court of general jurisdiction having jurisdiction over the parties and the subject matter, which decree contains a mandatory injunction commanding performance of the stipulation, one of the provisions of which is an agreement to accept the property set apart to each in satisfaction of all claims against the other, and which decree contains a prohibitory injunction barring all claims except as provided in the stipulation and where State law makes a divorce decree conclusive upon every claim between husband and wife whether or not actually litigated and adjudicated and forbids collateral attack on a judgment induced by fraud—may a Federal court in an action at law based upon diversity jurisdiction permit the defrauded party to bypass the exclusive State procedure for vacation of judgments induced by fraud, to ignore the decree and the injunctions therein contained and to recover damages for fraud inducing execution of the stipulation for division of property?

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C., Section 1738:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

General Statutes of Kansas, 1949

Section 60-3007:

"The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made:

* * *

"*Fourth.* For fraud, practiced by the successful party, in obtaining the judgment or order."

Section 60-3008:

"Proceedings to vacate or modify a judgment or order for the causes mentioned in subdivisions four, five and seven of the next preceding section must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, or person of unsound mind, and then within two years after removal of such disability."

Section 60-3011:

"The proceeding to vacate or modify the judgment or order on the grounds mentioned in subdivisions four, five, six, seven, eight and nine of section 596 [60-3007] shall be by petition verified by affidavit setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On such petition a summons shall issue and be served as in the commencement of an action."

General Statutes of Kansas, 1961 Supplement

Section 20-301:

> "There shall be in each county organized for judicial purposes, a district court, which shall be a court of record, and shall have general original jurisdiction of all matters, both civil and criminal (not otherwise provided by law), and jurisdiction in cases of appeal and error from all inferior courts and tribunals, and shall have a general supervision and control of all such inferior courts and tribunals, to prevent and correct errors and abuses."

Section 60-1501:

> "The district court may grant a divorce for any of the following causes:"

V. STATEMENT OF THE CASE

Jurisdiction of the District Court was founded upon diversity under 28 U.S.C., Section 1332. (R. 13, Finding 1)

On June 29, 1959, R. E. Hood, petitioner, filed suit for divorce against Ruby Gay Hood, respondent, in the District Court of Seward County, Kansas. (R. 21) On the same day the parties entered into a stipulation for division of property, which was filed in the pending action on the following day.

The stipulation was entitled in the divorce action. (R. 4) It provided for transfer to the defendant wife of the residence and furniture and for the payment of the sum of $60,000 by plaintiff husband to defendant wife. (R. 4) The stipulation provided:

> "8. Each of the parties accept the provisions herein made and the property hereinbefore set over to them as their separate estates in full settlement

and satisfaction of all rights, claims, and demands upon the other of every kind and nature, including alimony, support, suit money, attorney fees, inheritance, dower, interests in lieu of dower, statutory allowances or division of property whether arising out of the marital relationship or otherwise and from and after approval of this stipulation neither of these parties shall inherit from the other under the statute of descents and distributions, or under any Will heretofore executed." (R. 5)

On January 15, 1960, defendant wife filed an answer and cross-petition for divorce. (R. 22-23)

The case was heard on January 16, 1960, and a divorce granted to defendant wife. The decree provided:

"* * * The Court * * * finds * * * that the parties have by stipulation approved by the Court provided for the settlement of their property rights and the custody and support of their minor child, which stipulation should be made a part of judgment of this Court.

* * *

"It Is Therefore by the Court Ordered, Adjudged and Decreed * * * that such stipulation be entered on the journal and be a part of this judgment.

"It Is Further Ordered, Adjudged and Decreed that the parties be and are hereby directed to carry out and perform all of the provisions of such stipulation which have not already been done and performed, and to carry out and perform the stipulation made in Court this day as previously recited herein, and that each of the parties be barred, foreclosed and excluded from any claim or demand against the other or the others property or estate, except as provided in such stipulations * * *." (R. 7-8)

Subsequently respondent discovered what she asserted was a fraudulent misstatement of the value of petitioner's

assets at the time of execution of the stipulation for division of property. Under Kansas law such a fraud authorizes vacation of the part of the divorce decree relating to division of property.[2] In Kansas the expression that fraud vitiates everything it touches is subject to the qualification that "the proper remedy be employed."[3]

In Kansas the proper procedure for attacking a judgment obtained by fraud is by petition and summons in the case in which the judgment was entered. G.S. Kan. 1949, 60-3007, 60-3011, *supra*, p. 4.[4] The procedure is exclusive.[5]

In Kansas collateral attack upon a judgment of a court of general jurisdiction is not permitted except for lack of jurisdiction. (*Infra*, pp. 21-24)

Disregarding the divorce decree and treating the stipulation for property settlement as an independent contract, respondent sued at law in the United States District Court for damages for fraud inducing execution of the stipulation for division of property. (R. 1-2) Such procedure is unknown in Kansas and has never before been attempted.

The District Court found upon conflicting evidence that petitioner knowingly understated the value of his assets and overstated his liabilities in negotiating the terms of the stipulation for division of property. (Finding 17,

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2. *Cunningham* v. *Cunningham*, 178 Kan. 97, 283 P.2d 405; *Hodge* v. *Hodge*, 186 Kan. 361, 349 P.2d 947.

3. *McCormick* v. *McCormick*, 82 Kan. 31, 39, 107 Pac. 546, 549.

4. The divorce decree was pleaded in the answer filed March 16, 1961. (R. 2-3) This was long prior to the expiration on January 16, 1962, of the time provided in G.S. Kan. 1949, 60-3008, for proceeding for vacation of the decree so far as it related to property.

5. *Johnson* v. *Schrader*, 150 Kan. 545, 95 P.2d 273.

R. 17) It found also that respondent believed and relied upon these representations in agreeing to the terms of and in executing the stipulation for division of property. (Finding 15, R. 16)[6]

Ignoring the divorce decree, the trial court entered a judgment for damages for fraud inducing execution of the stipulation for division of property. (R. 13-20)

The judgment was affirmed by a divided Court of Appeals. (*Infra*, pp. A1-A14)[6a]

The divorce decree "Ordered, adjudged and decreed that the parties be and are directed to carry out and perform all of the provisions of such stipulation * * *." (R. 7) The stipulation contained an agreement that the parties accepted the property set over to each "in full settlement and satisfaction of all rights, claims and demands upon the other of every kind and nature * * * whether arising out of the marital relationship or otherwise * * *." (R. 5, ¶ 8)

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6. The majority opinion of the Court of Appeals by use of the word "consult" (*infra*, p. A1) gives the impression that respondent first employed the lawyer who represented petitioner. The word "consult" does not appear in the trial court's findings in relation to conversations between respondent and petitioner's counsel in the divorce case. The trial court's findings, which were prepared by counsel for respondent, make clear that respondent summoned petitioner's lawyer in that capacity and told him to have petitioner remove his clothing and personal effects from the home. (Findings 3, 4, R. 14) Both the findings of the trial court and the majority opinion of the Court of Appeals state that petitioner's counsel did not advise respondent as to her legal rights. (Finding 4, R. 14; *infra*, p. A2)

6a. One or the other party to a divorce case usually thinks he or she has been defrauded. The remedy permitted by the courts below will likely provide the Federal courts with an unneeded influx of cases.

Without discussion of this portion of the decree and without mention of this portion of the stipulation, the majority opinion affirmed a judgment which permitted respondent to disregard the command of the decree and to recover money not provided for in the stipulation.

The court continued the subterfuge resulting from its omission to mention the provision of the stipulation by which the parties accepted the property set apart to them in full satisfaction of all claims against the other by the statement that respondent's suit for damages was on *affirmation* of the stipulation for division of property.[7] (*Infra*, p. A10)

It is the uniform rule in Kansas that a decree of divorce is a conclusive adjudication of every claim between husband and wife which arose during the marriage, whether or not actually litigated or specifically adjudicated. *Infra*, pp. 10-21)

Disregarding the Kansas rule, the majority of the court held that the parties did not intend to litigate the fairness of the stipulation for division of property, by reason of which it construed the portion of the decree "that each of the parties be barred, foreclosed and excluded from any claim or demand against the other or the other's property or estate except as provided in such stipulations" as a recital and not an adjudication.[8] (*Infra*, pp. A10-A11)

Under Kansas law an action for damages for fraud inducing a judgment cannot be maintained unless and until

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7. This same contention was unsuccessfully advanced in *Harchenko* v. *Harchenko*, 77 N.D. 289, 43 N.W.2d 200, a case on facts identical to those in the case at bar.

8. The court did not conclude that there was any want of jurisdiction to make the adjudication.

the judgment has been vacated.[9] Disregarding the Kansas rule, the court held that even considering the language of the decree barring the parties from claims against the other except as provided in the stipulation as an adjudication, respondent could still maintain an action for damages for fraud inducing the decree. (*Infra*, p. A11)

VI. ARGUMENT AND AUTHORITIES

A. Applicable Kansas Law

1. Under Kansas Law a Decree of Divorce Is Conclusive Adjudication of All Claims Between Husband and Wife Whether Actually Litigated and Specifically Adjudicated or Not

In *Mitchell* v. *Mitchell*, 171 Kan. 390, 233 P.2d 517, plaintiff sued upon a separation agreement which had not been called to the attention of the court which decreed a divorce. The court said:

> "All matters of property settlement between plaintiff and defendant could have been adjudicated in the second divorce action. Since they could have been adjudicated there and were not, they cannot be the subject of subsequent litigation." (233 P.2d 520)

Upon rehearing the court adhered to its former decision in *Mitchell* v. *Mitchell*, 172 Kan. 212, 239 P.2d 979. The court there said:

> "Plaintiff then argues that the circuit court of Missouri did not take jurisdiction of the separation agreement since it was not submitted to it. Her point is, that the circuit court of Missouri treats divorce

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9. *Corliss* v. *Davidson & Case Lbr. Co.*, 152 Kan. 327, 330, 103 P.2d 781, 783, following *Horner* v. *Schinstock*, 80 Kan. 136, 101 Pac. 996.

cases as cases in equity and since equity jurisdiction will extend only to controversies which arise and are submitted by proper proceedings the separation contract here involved, never being submitted to the circuit court, the judgment of the trial court entering the divorce decree had no effect whatever on it.[10]

"The Missouri circuit court, however, had jurisdiction and could have adjudicated the rights of the parties under the contract had they been submitted to it. Actually that is the point upon which *Calkins* v. *Calkins*, 155 Kan. 43, 122 P.2d 750, turned. We placed the decision in that case on the fact that the matters of alimony and division of property growing out of the separate maintenance action could have been settled in the subsequent divorce action. It is a well recognized general rule that where matters could have been adjudicated in an action between the same parties, the judgment in the earlier action will be *res judicata* of all those matters in a subsequent action between the same parties."[11] (239 P.2d 980)

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10. Cf. majority opinion: "No issue was raised, presented, or decided in the divorce action as to whether Mrs. Hood was induced to enter into the contract and consent to its approval through fraud practiced upon her by Hood. Hence, the provision in the decree 'that each of the parties be barred, foreclosed and excluded from any claim or demand against the other or the others property or estate, except as provided in such stipulations' was not an adjudication of that issue. It was merely a recital in substance of a provision of the stipulation." (*Infra*, pp. A10-A11).

11. Cf. majority opinion: "Here, that portion of the stipulation with respect to the property settlement by its express terms became fully effective, operative and binding on the parties when it was approved by the trial court on July 7, 1959. It required no decree of the court to give it full and immediately operative effect. We are of the opinion, that under the decisions of the Supreme Court of Kansas, the decree entered more than six months after the property settlement agreement became effective should not be construed to have the effect of canceling and wiping out the property settlement part of the stipulation as an operative contract and merging it in the decree." (*Infra*, p. A10)

"The argument of plaintiff in her motion for a rehearing, which was persuasive on the question of whether a rehearing should be allowed, was that by our decision of July 3, 1951, we were not giving full faith and credit to the Missouri judgment in the divorce action. Plaintiff points out G.S. 1949, 60-1518, which provides as follows:

> "'A judgment or decree of divorce rendered in any other state or territory of the United States in conformity with the laws thereof, shall be given full faith and credit in this state; . . .'

"On examination and reconsideration we can discern no particular in which our decision failed to give full faith and credit to that judgment. It was a divorce action, nothing more. We recognize it as such. Plaintiff concedes that the property matters could have been adjudicated by the circuit court of Missouri had such matters been presented to it. Since that is the case those matters cannot be made the subject matter of a subsequent action in this state. The application of such a rule does not deny full faith and credit to the Missouri judgment.

"The plaintiff also argues that our decision conflicts with our holding in *Petty* v. *Petty*, 167 Kan. 510, 207 P.2d 428. What we have already said is an answer to that argument." (239 P.2d 981)

The *Mitchell* case followed many earlier ones to the same effect. In *Mayfield* v. *Gray*, 138 Kan. 156, 23 P.2d 498, a husband held a note executed by the wife. A decree of divorce was granted which made no mention of the note. The court held that the decree was *res judicata* of the claim upon the note. In *Calkins* v. *Calkins*, 155 Kan. 43, 122 P.2d 750, at the time a decree of divorce was entered there was outstanding a judgment in favor of the wife for past due installments due under a decree for separate maintenance in a different suit. The divorce decree made

no mention of the outstanding judgment in the separate maintenance suit. The wife sought to enforce the judgment. The court held that the divorce decree was *res judicata* of any rights under the judgment. The first paragraph of the syllabus (by the court) reads:

> "In an action for divorce, matters of alimony, division of property and all obligations arising out of or connected with the marital relation may be presented and adjusted. If not then presented the judgment is as full and complete a bar to a subsequent assertion of such rights between the husband and wife as if they had been fully tried and determined in the divorce action."

To the same effect is *Zellner* v. *Zellner*, 155 Kan. 530, 127 P.2d 428, and *Breidenthal* v. *Breidenthal*, 182 Kan. 23, 29, 318 P.2d 981.

Obviously, if a decree, which is silent on the subject, operates as a conclusive adjudication of all claims between husband and wife, a decree which expressly adjudicates such claims is no less conclusive. All the Kansas cases so hold.

In *Feldmann* v. *Feldmann*, 166 Kan. 699, 204 P.2d 742, the court said:

> "From what has been heretofore stated it becomes apparent appellant now seeks to modify and do away with all of the terms of a judgment, in which he not only acquiesced but from which he has never appealed, regarded by him as adverse to his interests. He actually seeks to do more than that. If his position is sustained he will overthrow and reverse the ruling of June 14, 1947, also unappealed from, wherein the trial court, after having its attention called to his contentions with respect to the validity of the separation agreements, refused to change or modify the original judgment. Under such conditions and circum-

stances our first duty is to determine just what the record presents for appellate review.

"In this jurisdiction the rule is well established that, except for void judgments which by statute (G.S. 1935, 60-3009) are subject to attack at any time, the orders and judgment of a court having jurisdiction of the subject matter of an action and of all the parties thereto are final and conclusive as to all matters therein involved unless corrected or modified on appeal and that such matters cannot again be litigated by the parties to that action in the same court or any other court of concurrent jurisdiction upon either the same or a different cause of action." (204 P.2d 746)

* * * *

"Thus, since it clearly appears from the face of the record that both the original judgment and the one subsequently rendered on June 17, 1947, have long since become final and conclusive, appellant's claim that the trial court erred in overruling his motion to strike cannot be upheld unless that portion of the original judgment giving appellee custody of the children, confirming the property settlement agreements and making those agreements a part of such decree is void. *With issues so limited we are not concerned with questions pertaining to whether the contract was fairly and understandingly made, whether its provisions are reasonable or unreasonable or other matters of similar character which have become res judicata under the original judgment* and for that reason do not treat or discuss them even though they are specified as error and urged as grounds for reve l of the judgment." (204 P.2d 746-747) (Emphasis plied)

In *Feldmann* v. *Feldmann*, 179 Kan. 109, 292 P.2d 716, the court said:

"When what has been heretofore stated is supplemented by the full and complete factual statement of

Feldmann v. *Feldmann*, supra, it appears the all decisive questions involved in this appeal is whether, after a husband and wife have entered into a marriage settlement whereby they agree upon a division of property as between themselves and payments to be made by the husband to the wife for the care and support of their children, including maintenance of the wife while such children remain in her care and custody, and thereafter such agreement is approved by the trial court in a divorce action and made a part of its judgment and decree, the rights and liabilities of the parties are governed by the terms of the judgment, including the contract or by the statutory authority of the court in divorce cases.

"We think the foregoing question was involved and decided when this case was here before and is therefore res judicata so far as this appeal is concerned. Nevertheless, we have reexamined our decisions and, on the basis of what is said and held in *Feldmann* v. *Feldmann*, supra; *French* v. *French*, 171 Kan. 76, 229 P.2d 1014; *In re Estate of Shideler*, 172 Kan. 695, 242 P.2d 1057, and the numerous decisions therein cited, have no difficulty in concluding that under the existing facts and circumstances the rights of the parties are controlled by the original judgment of May 21, 1946 *which, as we have heretofore indicated, includes their marriage settlement contract and requires compliance with its terms and conditions.*" (Emphasis supplied) (292 P.2d 717)

Even in cases in which a property settlement agreement is merely approved in the decree, rather than being incorporated, as was done in divorce case involved in the case at bar, the parties are judicially bound by the terms of the approved property settlement.

In *Petty* v. *Petty*, 167 Kan. 510, 207 P.2d 428, after discussing *Hyde* v. *Hyde*, 143 Kan. 660, 56 P.2d 437, and *Hyde* v. *Hyde*, 147 Kan. 134, 75 P.2d 1023, the court said:

> "It is difficult to observe a wide distinction between the Hyde cases and the one now before us. In the instant case the separation agreement was also 'consented to' and 'signed' by the parties, although that was done prior to the divorce action instead of by stipulation in the pending case. In both cases the agreements were *approved* by the court—and we might say in both cases the parties are *by judgment bound by the terms of the contract.*" (207 P.2d 434)

The opinion mentions *French* v. *French*, 171 Kan. 176, 229 P.2d 1014, and *In re Shideler's Estate*, 172 Kan. 695, 242 P.2d 1057. In both of those cases the court approved property settlement contracts were enforced. There are no Kansas cases in which an approved property settlement was ever avoided except by following the statutory procedure for vacation of judgments.

The opinion also mentions, but does not discuss *United States National Bank* v. *Bartges*, 120 Colo. 481, 210 P.2d 600.

That case is a true anomaly. The divorce case was decided by the District Court of Sedgwick County, Kansas (Wichita).

Defendant was a wealthy man. He furnished to plaintiff's counsel an accurate list of his property, showing the value as shown by his books. (210 P.2d 602, 603) Plaintiff's wife was living in adultery with one of defendant's farm hands. (210 P.2d 603) Plaintiff entered into a property settlement with defendant which provided for the payment by the husband of $325,000, of which $250,000 went into a trust, out of which the wife was to be paid $550 per month for life, with remainder to the wife's children. (210 P.2d 602) The property settlement was not incorporated in the journal entry and does not appear in the file. It was exhibited to the court, approved by the

court in the decree and the parties enjoined from "claiming or asserting any right, title or interests in and to the property of the others as the same is established by the property settlement of the parties." (210 P.2d 602, 603)

The husband moved to Colorado and the wife sued him for damages for inducing her to execute the property settlement alleging fraud and duress. The trial court found that there was no duress, except such as plaintiff herself created by living in adultery with the hired hand, that "George P. Dickey was not guilty of affirmative fraud in the presentation of the statement of his financial worth which was furnished in pursuance of the motion made for a disclosure of his property," that considering the wealth of defendant the settlement "was inadequate and unfair * * * he was therefore guilty of extrinsic fraud in entering into such an agreement." (210 P.2d 603) The trial court ordered the creation of an additional trust which would produce an additional $450 per month income.

With two of the seven judges dissenting, the Supreme Court of Colorado affirmed the judgment on the main issue but reversed the trial court's order that the additional money be placed in a trust.

The court proceeded upon two theories. The first is stated as follows:

> "While it is true that by their pleadings the parties raised an issue of property rights and sought judicial division of the property, substantially by contracting with regard thereto, they effectually withdrew that issue from the case.[11a] Under the law of Kansas the contract became binding and conclusive upon the court, and deprived the court of jurisdiction to adjudicate

11a. Under Kansas law, withdrawal of the issue would render the stipulation a nullity. *Mitchell* v. *Mitchell*, *supra*, pp. 10-12.

> the property rights in the absence of any issue raised in the divorce action concerning fraud, duress, concealment or undue influence, or other grounds for invalidating the agreement." (210 P.2d 605)

The second is stated as follows:

> "Since the contract is not merged in the decree, the property settlement issue does not become res judicata. This unquestionably is the law in Colorado. * * * In the absence of a definite showing to the contrary, the presumption is that the common law of Kansas is the same as that of Colorado." (210 P.2d 606)

The court's first conclusion is said to be founded upon *Petty* v. *Petty*, 147 Kan. 342, 76 P.2d 850. But in that case the court did not hold that the court lacked jurisdiction to disapprove the settlement. It held that the trial court's disapproval was unsupported by and contrary to the evidence. The opinion reads:

> "In passing on the validity of the agreement, when judgment was rendered the trial court had nothing before it but the agreement itself and defendant's request in her cross petition that it be approved. We have the agreement before us and can read it and determine its meaning and validity as well as the trial court could do." (76 P.2d 855)

The opinion continues with an analysis of the separation agreement and the court's conclusion that it was fair and just.

Neither the injunction provision of the decree nor *Feldmann* v. *Feldmann*, 166 Kan. 699, 204 P.2d 742, were called to the attention of the court.

Upon remand the trial court entered judgment in favor of plaintiff for $1,575,000, not as damages, but as "a fair

and equitable division of property as required under Kansas law." (224 P.2d 661) A second appeal was taken, which is reported in 224 P.2d 658. The judgment was again affirmed.

By petition for rehearing the attention of the court for the first time was called to the injunction provision of the decree and to *Feldmann* v. *Feldmann*, 166 Kan. 699, 204 P.2d 742.

The court disposed of the injunction by stating, "Since the contract was not made a part of the decree, the Kansas court had neither jurisdiction nor power to control the future action of the parties with regard thereto." (224 P.2d 665)

Under the Kansas cases the decree was *res judicata* of all claims between husband and wife whether specifically adjudicated or not. The court disposed of *Feldmann* v. *Feldmann* in the following language:

> "In the Feldmann case the contract was made a part of the decree, as shown by this language in 166 Kan. 699, 204 P.2d at page 745: 'Appellee was then permitted to adduce her evidence. At its conclusion the trial court rendered the judgment from which this appeal springs granting appellee a divorce, giving her the custody of the children, confirming and approving the original and supplemental property settlement agreements, *and making such agreements a part and portion of its final judgment and decree.*' (Italics supplied). In other words, the contracts were merged into the judgment and decree and lost their independent identity. In the Dickey case, the court likewise 'approved' the settlement contract, *but it did not make it 'a part and portion of its final judgment and decree.'*" (Italics supplied). (224 P.2d 666)

The stipulation in the case at bar was even more thoroughly made a part of the decree than in the *Feldmann*

case. Not only did the decree incorporate it, it commanded the parties to carry it out and barred them from asserting any claim not conferred in the stipulation.

Petition for certiorari to the United States Supreme Court was filed. Prior to its consideration by the court, the parties agreed upon a settlement of $900,000, which was somewhat less than sixty per cent of the judgment. The petition for certiorari was then dismissed upon motion of petitioner. *United States National Bank* v. *Bartges*, 340 U.S. 957.

The *Mitchell* case had not been decided at the time of the last decision in the *Bartges* case. The cases of *Mayfield* v. *Gray*, *Calkins* v. *Calkins*, and second *Petty* v. *Petty* case, all *supra*, were not called to the court's attention. Instead the court indulged a presumption that the Kansas law was the same as the law of Colorado. (210 P.2d 606)

The wide differences between Kansas law and the Colorado court's mistaken presumption of Kansas law can be readily demonstrated.

In the first *Bartges* opinion the court said:

> "Since the contract is not merged in the decree, the property settlement issue does not become res judicata. This is unquestionably the law of Colorado." (210 P.2d 606)

In *Petty* v. *Petty*, 167 Kan. 510, 207 P.2d 428, in which the court held that the agreement had not been merged into the decree, the court still said:

> "It is difficult to observe a wide distinction between the Hyde cases and the one now before us. In the instant case the separation agreement was also 'consented to' and 'signed' by the parties, although that was done prior to the divorce action instead of by stipulation in the pending case. In both cases the

agreements were *approved* by the court—and we might say in both cases the parties are *by judgment bound by the terms of the contract.*" (207 P.2d 434)

In *Mitchell* v. *Mitchell,* 172 Kan. 212, 239 P.2d 979, the first paragraph of the syllabus (by the court) reads:

> "In an action to enforce the terms of a contract entered into by husband and wife, in contemplation of a divorce, where the plaintiff and defendant were divorced, remarried and subsequently divorced again, the matter of the enforcement of the contract entered into prior to the first divorce could have been adjudicated at the trial of the second divorce action and not having been adjudicated in that action cannot be the subject of subsequent litigation between the same parties."

2. Under Kansas Law a Judgment of a Court of General Jurisdiction Cannot Be Attacked Collaterally Except for Lack of Jurisdiction

The Kansas rule is concisely stated in paragraph 3 of the syllabus (by the court) in *McFadden* v. *McFadden,* 187 Kan. 398, 357 P.2d 751:

> "When a judgment has been entered in a case and has become final, it cannot be collaterally attacked in a subsequent proceeding, unless it appears that the judgment is void."

The rule is, of course, applicable to attacks of all kinds, including attacks on the ground that the judgment was fraudulently obtained.[12]

In *McCormick* v. *McCormick,* 82 Kan. 31, 107 Pac. 546, a husband sued for divorce in Missouri and served the wife

12. *Simpson* v. *Kimberlin,* 12 Kan. 579; *O'Keefe* v. *Behrens,* 73 Kan. 469, 85 Pac. 555; *Morris* v. *Sadler,* 74 Kan. 892, 88 Pac. 69; *Davis* v. *Davis,* 101 Kan. 395, 166 Pac. 515; *Bratton* v. *Luther,* 141 Kan. 489, 41 P.2d 1017.

in Kansas by publication. A decree was rendered which made no provision for alimony or division of property. Subsequently, the wife sued in Kansas for divorce and alimony and attached the husband's Kansas land. The trial court held that the Missouri decree was obtained by fraud and allowed $8,000 alimony. Upon appeal the Supreme Court held that the wife could not assert in an independent proceeding that the Missouri judgment was obtained by fraud and held that since alimony and division of property could have been litigated in the Missouri case that decree was *res judicata* against the wife's claim.

Upon the subject of attack upon the judgment the court said:

> "Expressions may be found in the law books to the effect that fraud vitiates whatever it touches, including judicial acts, which is true enough subject to the limitations stated in the Blue Rapids Case and provided the proper remedy be employed. In some cases courts have suffered judgments to be impeached collaterally on the ground of fraud, but the procedure is unsound. If allowed to prevail, the litigation could never be brought to a close. It could always be alleged that the last judgment was procured by fraud. * * * When jurisdiction has attached, the fraud of a party in procuring an irregular exercise of jurisdiction does not destroy jurisdiction, and nothing but want of jurisdiction is available on collateral attack." (107 Pac. 549)

Miller v. *Miller*, 89 Kan. 151, 130 Pac. 681, was an action in ejectment seeking recovery of real estate, title to which stood in the name of plaintiff's deceased husband. Defendant pleaded a Utah divorce granted to the husband. Plaintiff replied that the Utah divorce was obtained by fraud. The court held that the Utah decree could not be collaterally attacked for fraud. The court said:

"If that judgment had been rendered by a district court of Kansas, it would be subject to impeachment for sufficient cause. It could be set aside, or its effect could be nullified, for want of jurisdiction and for fraud; but it could be impeached on the ground that the plaintiff had not resided in the state for the statutory period, or for fraud practiced by the successful party, only in a direct action instituted for that purpose, and not in a collateral proceeding brought for the purpose of trying the title to real estate." (130 Pac. 684)

Respondent's position is the same as that of the plaintiffs in the two cases last cited. In all three cases plaintiff sued for relief ignoring the divorce decrees. In each case the defendant pleaded the judgment in bar. In each case plaintiff replied that the judgment was obtained by fraud. The result in the case at bar is necessarily the same as in the cited cases—the decree is not subject to collateral attack for fraud.

In the court below respondent relied upon *Leslie* v. *Proctor & Gamble Mfg. Co.*, 102 Kan. 159, 169 Pac. 193; *McAdoo* v. *Boten*, 67 Kan. 136, 72 Pac. 529; and *Klemp* v. *Winter*, 23 Kan. 69.

In each of those cases it was held that a judgment of a court of *inferior* jurisdiction could be attacked by a suit in equity in the district court. The divorce decree was rendered by a district court, which is a court of general jurisdiction.[13] Also the action is at law, not in equity.

The opinion below contains no discussion of the subject of collateral attack. It simply approves the collateral attack, citing *Chisholm* v. *House*, 10 Cir., 160 F.2d 632, 643.

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13. G.S. Kan., 1961 Supp., 20-301, *supra*, p. 5.

That case was a suit in equity, not an action at law.[13a] It was decided under Oklahoma law, not under Kansas law.

3. Under Kansas Law an Action for Damages for Fraudulently Procuring a Judgment Cannot Be Maintained Until the Judgment Has Been Vacated.

In *Corliss* v. *Davidson & Case Lbr. Co.*, 152 Kan. 327, 330, 103 P.2d 781, 783, the court said, "Before a party can recover damages on account of a judgment having been fraudulently obtained he must first set aside or reverse that judgment," citing *Horner* v. *Schinstock*, 80 Kan. 136, 101 Pac. 996.

The majority of the Court of Appeals simply ignored the Kansas law. (*Infra*, pp. A10-A11)

B. Importance of Granting the Writ

1. The Decision Results in an Unseemly Conflict Between Federal and State Court Decisions

However successful the Court of Appeals may have been in disguising its refusal to accord full faith and credit to the judgment of the State court, it certainly did not and could not disguise its action from the District Court of

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13a. The distinction between law and equity is of peculiar importance in the case at bar. Equity jurisdiction in the Federal courts is limited to that exercised by the High Court of Chancery in England at the time of the separation of the American Colonies from England. *Matthews* v. *Rodgers*, 284 U.S. 521, 529. Hence, the Federal courts have no jurisdiction over alimony or division of property acquired during marriage either as an original proceeding in chancery, or as an incident to a divorce. *Barber* v. *Barber*, 21 How. (62 U.S.) 582, 584; *Ohio ex rel. Popovici* v. *Angler*, 280 U.S. 379, 383. Federal courts have no jurisdiction to relieve from a State court judgment relating to alimony or division of property. *Schoonover* v. *Schoonover*, 10 Cir., 172 F.2d 526, 531-532, concurring opinion of Phillips, C.J.; *Linscott* v. *Linscott*, S.D. Iowa, 98 F. Supp. 802; *Manary* v. *Manary*, N.D. Cal., 151 F. Supp. 446.

Seward County, Kansas. There remains in full force and effect a decree commanding respondent to accept in full satisfaction of all claims against petitioner the provisions of the stipulation for property settlement. The present judgment is founded upon a claim which respondent has been commanded to discharge. The prosecution of the present action was a violation of the mandatory injunction and placed respondent in contempt of the District Court of Seward County, Kansas.

Even according to the Federal Court judgment full faith and credit does not purge respondent of contempt. *Lawrence* v. *Lawrence*, 79 N.J. Super. 25, 190 A.2d 206.

Disobedience of even an erroneous injunction constitutes contempt. The mandate must be obeyed until reversed upon appeal.[14] The Court of Appeals did not find the injunction invalid in any respect, nor could it have done so on collateral attack.[15]

What happens if the State court proceeds against respondent for contempt? The State court judgment long antedates the Federal court judgment. The Federal court cannot enjoin the proceeding in protection of its jurisdiction, because the State court judgment is prior in point of time. In addition it has no right to enjoin proceedings for civil or criminal contempt.[16]

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14. *Billard* v. *Erhart*, 35 Kan. 616, 12 Pac. 42; *State ex rel.* v. *Pierce*, 51 Kan. 241, 32 Pac. 924; *State ex rel.* v. *Wilson*, 162 Kan. 507, 178 P.2d 277; *Howat* v. *State of Kansas*, 258 U.S. 181 (under Kansas law); *United States* v. *United Mine Workers of America*, 330 U.S. 258, 293-295; *Smotherman* v. *United States*, 10 Cir., 186 F.2d 676.

15. *State ex rel.* v. *Wilson*, 162 Kan. 507, 178 P.2d 277, and cases cited.

16. *Ex parte Young*, 209 U.S. 123, 162; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 452-453.

If the State court proceeds to enforce its injunction, the conflict between the State and Federal court judgments must ultimately be resolved by this court. The conflict is brought into existence by the decision of the District Court and its affirmance by the Court of Appeals. It would seem advisable to settle the conflict now at its inception, rather than postponing determination until the State district court and State appellate court have passed upon it.

The necessity for avoidance of conflict between State and Federal courts has been a frequent subject of discussion. The problem was reviewed in *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 155. While that decision is no longer the law because of the 1948 amendment of 28 U.S.C., Section 2283, the discussion of the problem is still valid.

A discussion in an opinion of the Supreme Court of Kansas of what was done by the Court of Appeals in the case at bar would not likely promote harmonious relations between State and Federal judiciaries in the future.

2. The Opinion of the Court of Appeals Shows a Deliberate Evasion of the Statutory Duty to Accord to the State Court Judgment the Same Full Faith and Credit to Which It Would Have Been Entitled in the Courts of Kansas

By the Judiciary Act of 1790 (28 U.S.C., Section 1738) the courts below were required to accord to the divorce decree the same full faith and credit to which it would have been entitled in the courts of Kansas. In *Millikin* v. *Meyer*, 311 U.S. 457, this court, applying 28 U.S.C., Section 1738, held that the Supreme Court of Colorado lacked authority to declare a Wyoming judgment void on the ground that the findings and the decree were inconsistent.

It necessarily follows that the Court of Appeals lacked authority to ignore the mandatory injunction of the decree and lacked authority to convert the plain prohibitory injunction into a recital, particularly when the decree was conclusive on the subject with or without the specific adjudication contained therein.

The opinion recites the following portion of the divorce decree:

> "It Is Therefore by the Court Ordered, Adjudged and Decreed * * * that such stipulation be entered on the journal and be a part of this judgment.
>
> "It is further ordered, adjudged and decreed that the parties be and are hereby directed to carry out and perform all of the provisions of such stipulation which have not already been done and performed, and to carry out and perform the stipulation made in Court this day as previously recited herein, and that each of the parties be barred, foreclosed and excluded from any claim or demand against the other or the others property or estate, except as provided in such stipulations * * *." (R. 7-8).

To one not familiar with the facts, the opinion has successfully concealed the court's refusal to accord full faith and credit to the portion of the decree commanding respondent to accept the property set apart to her under the stipulation for division of property in full satisfaction of all claims and demands against petitioner whether arising out of the marital relationship or otherwise. But the court's refusal to accord full faith and credit to the portion of the decree barring and foreclosing respondent from any claim or demand against petitioner or his property except as stated in the stipulation for division of property is plainly stated to all Kansas lawyers and judges.

It is a clear statement that the mandate of 28 U.S.C., Section 1738, may be avoided if the judges disapprove of the consequences of obeying it.

The conclusion that the words, "It is further ordered, adjudged and decreed * * * that each of the parties be barred, foreclosed and excluded from any claim or demand against the other or the other's property or estate except as provided in such stipulations * * *" is not intended as an adjudication is at best farfetched. But the additional conclusions that the claim asserted in the suit had not been foreclosed by the decree and that a judgment of a court of general jurisdiction may be collaterally attacked immediately raises the hackles on every lawyer and judge in Kansas.

The Kansas rule that a divorce decree is *res judicata* of every claim between husband and wife whether actually litigated or specifically described or not goes back at least as far as *Roe* v. *Roe*, 52 Kan. 724, 35 Pac. 808, decided in 1894.[17]

The rule that a judgment of a court of general jurisdiction cannot be attacked collaterally except for lack of jurisdiction goes back to *Mastin* v. *Gray*, 19 Kan. 458, 466 (1878).[18]

Two Kansas cases support the rule that an action for damages for fraudulently inducing a judgment cannot be

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17. In addition to the cases cited on pp. 10-13, *supra*, the rule has been followed in *In re Smith*, 74 Kan. 452, 87 Pac. 189; *In re Estate of Heivly*, 102 Kan. 313, 169 Pac. 1141; *Pinkerton* v. *Pinkerton*, 122 Kan. 131, 251 Pac. 416; *Fusselman* v. *Fusselman*, 122 Kan. 515, 253 Pac. 411; *Noonan* v. *Noonan*, 127 Kan. 287, 273 Pac. 409.

18. The rule has been applied in a great many cases. The fraud cases are cited *supra*, p. 21, Note 12.

maintained until the judgment has been vacated.[19] We believe this rule to be universal in common law jurisdictions.[20]

The opinion discloses that a majority of the Court of Appeals regards petitioner as a defrauder and as such not entitled to rely upon the laws of the United States nor upon the laws of Kansas. But petitioner is not a confessed defrauder and the court which found him to be a defrauder had no right to try him.

The dangers to the administration of justice which inhere in denying the legal rights of even the most unrighteous citizen have been of concern to the members of this court.[21]

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19. *Horner* v. *Schinstock*, 80 Kan. 136, 101 Pac. 996; *Corliss* v. *Davidson & Case Lbr. Co.*, 152 Kan. 327, 330, 103 P.2d 781, 783.

20. *Gerini* v. *Pac. Employers Ins. Co.*, 27 Cal. App. 52, 80 P.2d 499; *Hall* v. *Hall*, 91 Conn. 514, 100 Atl. 441; *Duffy* v. *Frankenberg*, 144 Ill. App. 103; *Shultz* v. *Shultz*, 136 Ind. 323, 36 N.E. 126; *Fishman* v. *Alberts*, 321 Mass. 280, 72 N.E.2d 513; *Dunlap* v. *Glidden*, 31 Me. 435; *Smith* v. *Abbott*, 40 Me. 442; *Blair* v. *Blair*, 140 Mont. 278, 370 P.2d 873 (identical on facts with case at bar); *Lyford* v. *Demerrit*, 32 N.H. 234; *Town of Hillsboro* v. *Nichols*, 46 N.H. 578; *Stevens* v. *Rowe*, 59 N.H. 578; *White* v. *Merritt*, 7 N.Y. 352; *Smith* v. *Lewis*, 3 Johns. 157; *Harchenko* v. *Harchenko*, 77 N.D. 289, 43 N.W.2d 200 (identical on facts with case at bar); *Risman* v. *Kruper*, 45 Oh. App. 29, 186 N.E. 830; *Purdy* v. *Winters' Estate*, 79 Or. 614, 156 Pac. 285; *Cunningham* v. *Brown*, 18 Vt. 123.

21. *E.g.*, *Eisler* v. *United States*, 338 U.S. 189, 194 (dissenting opinion): "Law is at its loftiest when it examines claimed injustice even at the instance of one to whom the public is bitterly hostile"; *Abel* v. *United States*, 362 U.S. 217, 248 (dissenting opinion): "This is a notorious case, with a notorious defendant. Yet we must take care to enforce the Constitution without regard to the nature of the crime or the nature of the criminal."

In the famous case of *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 866, this court said:

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. * * * Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

"* * * Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. * * * None the less, by that abuse of power, they violate the law." (Cardozo, Nature of the Judicial Process, 129)

"* * * Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained." *Clyatt* v. *United States*, 197 U.S. 207, 222.

"* * * The supremacy of the law is the foundation rock upon which our institutions rest. The law, this court said in *United States* v. *Lee*, 106 U.S. 196, is the only supreme power in our system of government." *Northern Securities Co.* v. *United States*, 193 U.S. 197, 350.

Respondent's position also was one which should not have appealed to a court. She was subject to a mandatory injunction to perform the stipulation by accepting the provisions made for her therein in full satisfaction of all claims and demands against petitioner and to a prohibitory injunction against any other claim or demand against petitioner. (R. 7, 8) She had an adequate and speedy remedy available to her to secure vacation of those injunc-

tions.[22] She intentionally and deliberately chose not to seek vacation of the injunctions and proceeded in violation thereof.

In *United States* v. *United Mine Workers of America*, 330 U.S. 258, 293. this court said:

> "Proceeding further, we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued. In Howat v. Kansas, 258 U.S. 181, 189, 190, 66 L. Ed. 550, 559, 42 S. Ct. 277 (1922) this Court said:
>
> "'An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.'"

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22. G.S. Kan. 1949, 60-3007, 60-3008, 60-3011, *supra*, p. 4; *Cunningham* v. *Cunningham*, 178 Kan. 97, 283 P.2d 405; *Hodge* v. *Hodge*, 186 Kan. 361, 349 P.2d 947. The divorce decree was pleaded in the answer filed March 16, 1961. (R. 2-3) This was long prior to the expiration on January 16, 1962, of the time provided in G.S. Kan. 1949, 60-3008, for proceeding for vacation of the judgment.

The State of Kansas also has an interest in seeing that the judgments of its courts of general jurisdiction are not collaterally attacked in the course of forum shopping.

Accepting the trial court's findings, petitioner did an injury to respondent. It was an injury for which a remedy was provided by the laws of Kansas. But the Court of Appeals by its refusal to obey 28 U.S.C., Section 1738, has done an injury to the law. The injury to the law is committed for the purpose of conferring upon respondent a remedy not provided by Kansas law. This is not a lawful purpose. Thus, the Court of Appeals, in its desire to punish petitioner, has committed an unlawful act for an unlawful purpose.

As individuals the members of the United States Court of Appeals are entitled to the same emotions as other citizens, but as judges they are held to a higher standard. The wrong committed by petitioner does not justify the greater wrong done to the law. The punishment of petitioner will end, but the injury to the law will hamper the administration of justice for a long time to come.

PRAYER

WHEREFORE, petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the proceedings had in the case numbered and entitled on its docket No. 7556, R. E. Hood, Appellant, v. Ruby Gay Hood, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United

States, and that the judgment of the said United States Court of Appeals for the Tenth Circuit be reversed by this court, and for such other relief as to this court may seem proper.

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APPE NDIX

OPINION OF COURT OF APPEALS

Before PHILLIPS, LEWIS and BREITENSTEIN, Circuit Judges.

PHILLIPS, Circuit Judge.

R. E. Hood and Ruby Gay Hood were husband and wife. Their marriage was dissolved by a decree granting her a divorce. Prior to the divorce, they entered into a property settlement agreement. Mrs. Hood brought this action against Hood to recover damages for deceit, alleging that she was induced by fraud practiced upon her by Hood to enter into the property settlement agreement. From a judgment for Mrs. Hood, he has appealed.

The facts appear in the record only in the findings of the trial court, which are not challenged.

The Hoods were married in March, 1940. Two children were born of the marriage, a son 18 years of age and a daughter 3 years of age at the time of the divorce in January, 1960.

During several years prior to the divorce the Hoods had experienced marital difficulties. In June, 1959, Mrs. Hood decided to seek a legal separation from her husband. They then resided at Liberal, Kansas. About the middle of that month, she consulted a member of the Kansas bar, who was a near neighbor of the Hoods and who for several years had served as legal counsel for Hood, his father, and other members of the family. She told the lawyer she had determined to obtain a legal separation from her husband. The lawyer advised her that an action for separate maintenance would be unwise and not for the best

interests of Hood in his business, and that if she was determined to separate from him permanently, it would be better for them to be divorced. She agreed to follow his advice and asked him to contact Hood with respect to an immediate separation. On several occasions during the ensuing two weeks, Mrs. Hood conferred with the lawyer at his office. He did not advise her as to her legal rights and Hood's obligations with respect to a division of their property. He did advise her it would be better for them to agree on a division of their property and the custody of their children.

A few days prior to June 29, 1959, Hood, who also had consulted the lawyer, came to the home and told Mrs. Hood he was there to work out an agreement on the division of their property. In her presence he wrote out a financial statement, which he represented to her to be an accurate and complete disclosure of the nature, extent, and value of their property and their net worth, which the statement indicated was $288,000. He also told Mrs. Hood that he owned three quarter sections of land, which were a gift to him from his father, and that the lawyer had advised him "he did not have to divide with her." Originally, he proposed a property settlement on the basis of one-half of the net value, or $144,000, to each. Mrs. Hood agreed to the proposal. Under it, the home was to be conveyed to her as a part of her share. On the following day, Hood returned to the home and informed Mrs. Hood the lawyer had advised him he would be unable to pay her $94,000 over and above the agreed value of the home, because of his tax liabilities, and prevailed upon her to agree to accept $60,000 in addition to the home as a full settlement and division of their property.

On June 29, 1959, Hood and Mrs. Hood met at the office of the lawyer. The lawyer prepared a property

settlement stipulation based on the oral agreement which they had reached, under which the home was to be conveyed to Mrs. Hood and Hood was to pay her $60,000 in installments, and it further provided that Mrs. Hood should receive the household furniture and furnishings in the home, one share of stock in a country club, personal jewelry, clothing, and other personal effects, and she was to retain all interest in real estate or mineral rights conveyed to her by her parents and to which she held title. It also provided for child support for the minor daughter and for her custody. In the stipulation it was provided that the action should not be set for trial on the divorce issue until one year from the date of the stipulation, but that the provisions thereof with respect to the property settlement should become "fully effective" as soon as "approved by the Court"; that the parties should execute all necessary conveyances to carry it into effect, and that the stipulation should be made a part of the court's final judgment and decree, settling and determining the respective property rights of the parties. The Hoods executed the stipulation. The lawyer also prepared a petition for divorce by Hood against Mrs. Hood and an entry of appearance in the action by Mrs. Hood, which she signed, and on the same day the petition and entry of appearance were filed in the District Court of Seward County, Kansas.

On July 7, 1959, the lawyer presented the property settlement stipulation to the Judge of the District Court of Seward County, Kansas, who noted his approval of the stipulation in the margin thereof. That was done without a hearing, without any evidence, and without the presence or knowledge of Mrs. Hood. The divorce proceeding remained in that posture for about six months and during that period the Hoods remained separated.

In January, 1960, Mrs. Hood went to the office of the lawyer and told him that since Hood had continued in the conduct which caused her to demand a separation, she desired and insisted on an immediate hearing of the divorce action. The lawyer, who, for clarity, we will hereafter refer to as Hood's lawyer, advised Mrs. Hood he was Hood's attorney and could not represent her and that she would have to obtain the services of another lawyer. After some discussion they agreed on another lawyer to represent her. Hood contacted such other lawyer, hereinafter referred to as Mrs. Hood's lawyer, and he agreed to represent her. Hood's lawyer advised Mrs. Hood's lawyer the parties had agreed on a property settlement and support money for and custody of the minor daughter, and that the divorce could be obtained by default upon a cross-petition of Mrs. Hood. Hood's lawyer prepared an answer and cross-petition and Mrs. Hood and her lawyer signed it. It was filed January 15, 1960, and on the following day the divorce action came on for hearing.

Prior thereto, Mrs. Hood had conferred with her lawyear, but solely as to matters relating directly to the divorce action. At the conference there was no discussion of the value or extent of the Hood's property, of the financial statement, or any other pertinent documents, nor any facts relating to their property or a division thereof between them. Mrs. Hood received no counsel or advice from her lawyer with respect to those matters.

Mrs. Hood and a corroborating witness for her appeared and testified at the divorce hearing. Hood did not appear, but was represented by his lawyer. Neither the financial statement prepared by Hood at the time of the oral agreement, as to the property settlement, nor any other financial statement or pertinent document was pre-

sented to the trial judge, nor was any evidence presented as to whether the property settlement was fair, equitable, freely made, without fraud or overreaching, nor was any evidence offered as to what extent, if any, Mrs. Hood had the advice of independent counsel with respect to the property settlement. On the same day that the divorce action was heard, the court entered a decree which granted Mrs. Hood a divorce. The decree recited that the stipulation had been filed in the cause and stated:

> "It Is Therefore By The Court Ordered, Adjudged And Decreed * * * that such stipulation be entered on the journal and be a part of this judgment.
>
> "It is further ordered, adjudged and decreed that the parties be and are hereby directed to carry out and perform all of the provisions of such stipulation which have not already been done and performed, and to carry out and perform the stipulation made in Court this day as previously recited herein, and that each of the parties be barred, foreclosed and excluded from any claim or demand against the other or the others property or estate, except as provided in such stipulations * * *."

The trial court did not specifically find which of the lawyers drafted the final decree in the divorce action. However, because of the fact that Hood's lawyer drafted every other writing filed in such action, including Mrs. Hood's answer and cross-complaint, which sought only a divorce, and because of the language of the decree relating to the property settlement, we entertain no doubt that he also drafted the decree to be the final step in Hood's fraudulent plan to obtain a binding property settlement that would be grossly unfair to Mrs. Hood.

At the time the representations above set forth were made to her by Hood; at the time she entered into oral

agreements with Hood with respect to a property settlement; at the time she executed the stipulation; and at the time of the divorce hearing, Mrs. Hood knew little or nothing about her husband's business affairs and the properties acquired and controlled by him during their married life, and she believed and relied upon the financial statement and the oral statements and representations made to her by Hood, as to the value and extent of their property and their indebtedness.[1] She was not afforded the advice and counsel of an independent lawyer, responsible to her, and she was deprived of any opportunity for a fair and full investigation with respect to such property and indebtedness.

With the exception of a single quarter section of land, Hood substantially and in some instances grossly understated the value of the assets and property in the financial statement and in the oral representations he made to Mrs. Hood with respect thereto, and he entirely omitted some of his assets from such statement and overstated therein his personal indebtedness by approximately $47,000.

Hood, at all times material herein, was a successful and astute businessman, who, during the period of the marriage, had built and accumulated a very substantial estate. He could easily have obtained a financial statement from his bookkeepers or accountants, which would have reflected the true and fair value of such estate and the indebtedness owed by him. He knowingly and deliberately understated the assets and overstated the liabilities to his wife.

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1. That Mrs. Hood imposed explicit trust and confidence in her husband is confirmed by the fact that on July 29, 1959, she executed a will drafted by Hood's lawyer, in which she designated Hood and such lawyer as coexecutors and trustees, with broad powers of management of her estate, including the power to compromise claims of the estate.

Certain television properties were listed in the financial statement at a value of $140,000. Within three months after the divorce was granted, Hood had arranged the sale of such properties for a price of $625,000, and at the time of the divorce action he had made arrangements to obtain an independent evaluation and approval of the sale of such properties. These television properties, which were jointly acquired by the Hoods, were grossly undervalued by Hood in his representations to his wife, with full knowledge on his part of the fair value thereof.

Evidence of the net taxable income from the television properties, and of the net taxable income attributable to Hood personally and to "inside" corporations which he owned or controlled, established and confirmed that the fair values of his properties were greatly in excess of the values he represented to his wife, and that he so knew at the time he made such representations.

The trial court awarded Mrs. Hood judgment for $125,000. Hood has appealed.

The only defense to Mrs. Hood's action urged below that is here relied on is that the divorce decree was a bar to Mrs. Hood's action.

It will be observed that while under the terms of the stipulation the trial of the divorce issue was postponed for a year, the provisions of the stipulation with respect to the property settlement upon approval by the court, without more, and without the incorporation thereof in any order or decree of the court, were to become immediately effective and operative on the parties and required them to make the necessary conveyances to carry it into effect.

We are of the opinion that it was the intent of Hood and Mrs. Hood that the property settlement should be

approved by the state court, without any inquiry or determination by the judge thereof as to the extent or value of their property, as to the indebtedness of Hood, or as to the fairness of the property settlement, and that the parties tacity so agreed. It was so construed by counsel for Hood when he presented it for *ex parte* approval by the state court judge and by the judge when he so approved it on July 7, 1959.

We conclude that it was the design and purpose of Hood, by the false representations made by him to Mrs. Hood with respect to the extent and value of the property and his indebtedness, to induce her to enter into the stipulation and to consent that it might be approved by the state judge, without any inquiry or determination as to the extent or value of their property and his indebtedness, or as to the fairness of the agreed property settlement, and that it should become immediately effective on such approval; and further, that it was the design and purpose of Hood by such false representations to cause Mrs. Hood not to seek the advice of independent counsel with respect to whether the property settlement was fair, just and equitable as to her, and to cause her not to seek in the divorce proceeding an inquiry and determination by the court as to whether the property settlement was fair, just and equitable as to her, and through a continuance of such deception to cause her not to challenge the fairness of the property settlement in her cross-complaint or at the divorce hearing, and that such design and purpose was fully accomplished by Hood by such fraudulent representations. There can be no doubt if such an inquiry had been made by the court in the divorce proceeding and Hood had made a full and truthful disclosure as to their property, the court would have set aside its approval of the property settlement and disapproved the same.

It is the public policy of Kansas to encourage parties experiencing marital difficulties to settle their respective property rights by voluntary agreements,[2] and it is the tendency of the Kansas courts to approve and carry out property settlements agreed to by the parties.[3]

Kansas does not follow the law of some jurisdictions that the incorporation of a property settlement contract in a decree by making it a part thereof gives the contract the status of a court decree that can be enforced only by an order of the court, for the reason that such a rule tends to discourage "the solution of marital difficulties by contract rather than by recourse to the courts."[4]

A separation agreement approved by the court and incorporated in its decree will not be regarded as merged in the decree "in the absence of clear and unequivocal language requiring that conclusion. Even then it is by no means certain it can be said or held that such agreement is extinguished to the extent its contractual provisions are no longer binding upon the parties."[5] That is especially true where there was no inquiry by the court with respect to the fairness and reasonableness of the property division and no finding by the court on evidence adduced that the division was fair, equitable and reasonable.[6]

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2. *In re Shideler's Estate*, 172 Kan. 695, 242 P.2d 1057, 1060; *Petty* v. *Petty*, 167 Kan. 510, 207 P.2d 428, 433.

3. *Petty* v. *Petty*, 167 Kan. 510, 207 P.2d 428, 433.

4. *Petty* v. *Petty*, 167 Kan. 510, 207 P.2d 428, 433; *In re Shideler's Estate*, 172 Kan. 695, 242 P.2d 1057, 1060.

5. *French* v. *French*, 171 Kan. 176, 229 P.2d 1014, 1018; *In re Shideler's Estate*, 172 Kan. 695, 242 P.2d 1057, 1058; *Petty* v. *Petty*, 167 Kan. 510, 207 P.2d 428, 433, 434, 435. See also: *United States Nat. Bank of Denver* v. *Bartges*, 120 Colo. 317, 210 P.2d 660, 604, 605, 606, c.d. 338 U.S. 955.

6. *In re Shideler's Estate*, 172 Kan. 695, 242 P.2d 1057, 1060; See *Petty* v. *Petty*, 167 Kan. 510, 207 P.2d 428, 433, 434, distinguishing *Hullet* v. *Hullet*, 133 Kan. 738, 3 P.2d 470, on that ground.

Here, that portion of the stipulation with respect to the property settlement by its express terms became fully effective, operative and binding on the parties when it was approved by the trial court on July 7, 1959. It required no decree of the court to give it full and immediately operative effect. We are of the opinion, that under the decisions of the Supreme Court of Kansas, the decree entered more than six months after the property settlement agreement became effective should not be construed to have the effect of canceling and wiping out the property settlement part of the stipulation as an operative contract and merging it in the decree.

Moreover, the instant action is neither an action to set aside the property settlement agreement nor the decree of the court. On the contrary, it affirms the contract, and is a tort action for deceit seeking damages from Hood on account of the fraud practiced on Mrs. Hood by him. An action to recover damages for fraud inducing a contract is founded on tort and not on the contract and proceeds on the theory of affirmance of the contract fraudulently procured.[7]

It follows that the precise question here presented is whether the divorce decree is a bar to such an action. No issue was raised, presented, or decided in the divorce action as to whether Mrs. Hood was induced to enter into the contract and consent to its approval through fraud practiced upon her by Hood. Hence, the provision in the decree "that each of the parties be barred, foreclosed and excluded from any claim or demand against the other or the others property or estate, except as provided in such stipulations" was not an adjudication of that issue. It

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7. 37 C.J.S., Fraud, §63, pp. 352, 353; *Chanin* v. *Chevrolet Motor Co.*, 7 Cir., 89 F.2d 889, 891; *McWilliams* v. *Barnes*, 172 Kan. 701, 242 P.2d 1063, 1065, 1066.

was merely a recital in substance of a provision of the stipulation.

But, even if the property settlement stipulation was merged in the judgment and the above language of the decree be regarded as an adjudication of that issue, Mrs. Hood, through the fraud practiced upon her by Hood, was induced to enter into the property settlement stipulation, to consent to its *ex parte* approval by the court without any inquiry as to whether it was fair, just and equitable, and to refrain from seeking the advice of independent counsel with respect to such property settlement and to refrain from seeking a full inquiry and determination by the court in the divorce proceeding as to whether the property settlement was fair, just and equitable as to her, and to refrain from questioning the fairness and reasonableness of the property division in the divorce proceeding. And if such fraud was extrinsic or collateral fraud, Mrs. Hood was entitled to equitable relief, precluding Hood from setting up the judgment as a defense to her action for fraud.[8]

We think it was extrinsic fraud. This court, in *Chisholm* v. *House*, 160 F.2d 632, 643, defined extrinsic fraud as follows:

> "* * * Fraud is regarded as extrinsic or collateral where it prevents a party from having a trial or from presenting his cause of action or his defense, or induces him to withdraw a defense, or operates upon matters pertaining not to the judgment itself, but to the manner in which it was procured. * * *"

The Kansas courts have defined extrinsic fraud as "some act or conduct of the prevailing party which has prevented a fair submission of the controversy."[9]

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8. *Chisholm* v. *House*, 10 Cir., 160 F.2d 632, 643.

9. *Lowry* v. *Lowry*, 174 Kan. 526, 256 P.2d 869, 870; *Prideaux* v. *Prideaux*, 169 Kan. 644, 220 P.2d 538, 542.

In *Prideaux* v. *Prideaux*, 169 Kan. 644, 220 P.2d 538, 542, where the plaintiff, in an action to set aside a divorce decree, alleged that she had withdrawn her cross-petition for divorce and permitted her husband to obtain a divorce decree in reliance upon representations made to her by her husband that a property settlement entered into between them was fair, and that a stipulation settling the property rights was grossly unfair, the court held the complaint charged extrinsic fraud as a ground for setting aside the decree.

Accordingly, we conclude that the decree of divorce was not a good defense to the instant action and the judgment is affirmed.

LEWIS, Circuit Judge, dissenting.

I must respectfully dissent. Although it is clear from the case law of Kansas that it is the public policy of that state to encourage the independent settlement of property rights in divorce cases and to leave the enforcement of such agreements to the law of contracts, it is equally clear that jurisdiction of the property settlement may be retained in the divorce court by merger of the settlement in the decree. The intent to so merge will not be read into the decree absent clear and unequivocal language to that effect. In my opinion, the language contained in the decree at bar requires the conclusion that a merger was intended. The decree not only recites that the agreement "be a part of the judgment" but contains a specific provision for enforcement of the agreement by both affirmative and negative orders directed to the parties. Such language seems entirely inconsistent with a contract deemed independent of the decree and over which the court would have no continuing jurisdiction. Unless the Kansas court intended that the property settlement be

merged in the decree it could not order "that . . . the parties . . . carry out and perform all of the provisions of the stipulation . . ." nor bar the parties "from any claim or demand against the other . . . except as provided in the stipulations. . . ."

Nor can I agree that the fraud indicated in the case at bar was extrinsic either traditionally or under Kansas law. *Prideaux* v. *Prideaux*, 169 Kan. 644, 220 P.2d 538, is distinguishable. There, Mrs. Prideaux was induced to withdraw an affirmative claim, to abandon a defense and to submit to a default. She was, in effect, led right out of court. But in the case at bar Mrs. Hood appeared in the divorce court, was represented by counsel, testified in person, called a witness in her behalf and sought and obtained a decree of divorce and other relief.[1] Mr. Hood's unconscionable conduct induced her to agree to and present to the divorce court for approval a s tlement of property rights; the other inducements stated in the prevailing opinion, and there properly qualified, are not specifics. Had Mr. Hood given undisputed but perjured

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1. The state court record states:

"Now on this 16th day of January, 1960, a regular day of this January term Plaintiff appears by Chas. Vance, his attorney and Defendant appears in person and by Rex Neubauer, her attorney.

"Both parties agree that the case should be tried at this time. Plaintiff offers evidence and rests and Defendant offers evidence and the cause is argued by the attorneys. The Court being fully advised in the premises finds that Plaintiff has been guilty of extreme cruelty and Defendant is entitled to a divorce and that the settlement of their property rights and the custody and support of their minor child, which stipulation should be made a part of judgment of this Court."

The federal trial court found:

"The wife appeared at the divorce case in person with her attorney and a corroborating witness. The husband did not appear, but his attorney Charles Vance, was present."

testimony at the trial Mrs. Hood would have been victimized to the same extent.

I would hold that the instant action, though couched in terms of tort, is actually a collateral attack upon a state judgment and, as such, prohibited both under state and federal law. *McCormick* v. *McCormick*, 82 Kan. 31, 107 Pac. 546; *Murrell* v. *Stock Growers' Nat'l Bank*, 10 Cir., 74 F.2d 827. Relief from Mr. Hood's fraud should be left to the state court in which it warped the judicial process.